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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF OREGON

9 SUSAN T. BURROUGHS,

Civ. No. 04-1019-AA  
OPINION AND ORDER

10 Plaintiff,

11 vs.

12 MICHAEL R. SHINN,

13 Defendant.  
14

15 Sara Allen  
16 Hohbach Allen LLP  
4000 Kruse Way Place, Bldg. 2, Suite 340  
17 Lake Oswego, Oregon 97035  
Attorney for plaintiff

18 Thomas E. Cooney  
19 David J. Madigan  
Cooney & Crew, LLP  
4949 Meadows Road, Suite 460  
20 Lake Oswego, Oregon 97035  
21 Attorneys for defendant

22 AIKEN, Judge:

23 At issue are cross-motions for summary judgment as well as  
24 a motion for sanctions filed by the defendant. Plaintiff's  
25 summary judgment motion is granted in part and denied in part;  
26 defendant's summary judgment motion is granted in part and denied  
27 in part; and defendant's motion for sanctions is denied.

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1           In the "early months of 2003" plaintiff spoke with  
2 defendant's legal assistant, Kari Morando, who informed plaintiff  
3 that Schielder had not been served because she (Morando) had  
4 forgot to send it out for service. Plaintiff then spoke to her  
5 cousin, an Alabama attorney, and Karen Turner, a clerk for the  
6 United States District Court for the Southern District of  
7 Alabama, about the effect of failure to serve Schiedler.  
8 Plaintiff states that both her cousin and Turner advised her to  
9 "serve him anyway." Plaintiff then recalls contacting defendant  
10 either via a written letter or electronic mail advising him to  
11 serve Schielder "anyway."

12           Sometime in February or March 2002, defendant had a  
13 telephone conversation with plaintiff and informed plaintiff that  
14 he had failed to serve a copy of the summons and complaint on  
15 Schiedler in the time allowed by law, and he had missed the  
16 statute of limitations. Plaintiff then suggested to defendant  
17 that he file an amended complaint in an attempt to "cure" the  
18 statute of limitations (SOL) problem. Defendant stated that he  
19 would conduct research on this issue. After conducting research,  
20 defendant determined that filing an amended complaint would not  
21 cure the SOL problem, and it would be fruitless to continue to  
22 work on the case.

23           Plaintiff filed the complaint at bar on July 26, 2004.  
24 Plaintiff alleges three claims against the defendant, they are:  
25 (1) professional negligence; (2) breach of contract; and (3)  
26 fraud.

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1 the civil action within the time allowed by Oregon law.  
2 Plaintiff asserts that as a result of defendant's failure to  
3 commence her action in a timely fashion, she has been damaged in  
4 the amount of \$3.5 million. Defendant moves for summary judgment  
5 on two issues, as follows: (1) whether plaintiff commenced her  
6 action against defendant within the time allowed by law; and (2)  
7 whether the fee agreement between plaintiff and defendant is  
8 sufficient to satisfy the requirements of Oregon law to  
9 constitute a breach of contract claim.

10 1. Breach of Contract Claim

11 The parties cross-move for summary judgment on plaintiff's  
12 breach of contract claim. Defendant's motion is granted and this  
13 claim is dismissed.

14 The Contingent Fee Agreement between plaintiff and defendant  
15 relied upon by the plaintiff for her breach of contract claim  
16 provides that plaintiff retains and employs defendant to  
17 prosecute or settle all claims for damages sustained by plaintiff  
18 as a result of injury incurred on September 7, 1999. See  
19 Defendant's Ex. A. The Agreement does not provide any specific  
20 provision as to the standard of skill and care to be exercised by  
21 defendant, nor does the Agreement articulate the performance  
22 expected by plaintiff and promised by defendant. Plaintiff  
23 alleges that the defendant failed to exercise the "minimum  
24 standard for ethical practice and conduct of members of the State  
25 Bar of the State of Oregon and/or United States District Court  
26 for the District of Oregon" in handling her case. Complaint,  
27 ¶ 12.

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1 Defendant asserts that the breach alleged by plaintiff is  
2 not a specific standard spelled out in the Agreement, but rather  
3 is a professional standard required by defendant independent of  
4 the Agreement. Defendant's conduct was governed by the Oregon  
5 Code of Professional Responsibility, DR 6-101 Competence and  
6 Diligence, which provides:

7 (A) A lawyer shall provide competent representation to  
8 a client. Competent representation requires the  
9 legal knowledge, skill, thoroughness and preparation  
reasonably necessary for the representation.

10 (B) A lawyer shall not neglect a legal matter  
entrusted to the lawyer.

11 Id.

12 Defendant asserts that plaintiff's complaint alleges that  
13 defendant breached a duty governed by the Oregon Code of  
14 Professional Responsibility, not a duty that was specified in the  
15 Agreement. Therefore, there can be no breach of contract claim  
16 based on that Agreement. I agree and find that the duties  
17 alleged to have been breached are independent of the Agreement.  
18 Like the court in McComas, I find that any promises by the  
19 defendant to reinstate plaintiff's case, were gratuitous and  
20 created no contractual duty. McComas v. Bocci, 166 Or. App. 150,  
21 996 P.2d 506 (2000). Defendant's alleged promises were made  
22 months after the Contingent Fee Agreement was entered into.  
23 Moreover, I find no allegations by plaintiff, or evidence in the  
24 record, that these alleged promises were supported by any  
25 consideration other than the original Contingent Fee Agreement.  
26 Summary judgment is therefore granted for the defendant as to  
27 plaintiff's breach of contract claim. Plaintiff's breach of  
28 contract claim is dismissed.

1           2.   Statute of Limitations

2           The parties next cross-move for summary judgment on  
3 plaintiff's claims for negligence and fraud. Defendant asserts  
4 that these claims are barred by the applicable statute of  
5 limitations, while plaintiff asserts that she is entitled to  
6 judgment on these claims as matter of law.

7           Plaintiff's common law negligence and fraud claims arise  
8 under Oregon law and are controlled by Oregon's tort SOL. "[In]  
9 a diversity case, substantive issues are controlled by state law  
10 and procedural issues are controlled by federal law." Erie R.  
11 Co. v. Tomkins, 304 U.S. 64 (1938). "[S]tate law determines when  
12 an action is commenced for statute of limitations purposes."  
13 Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980). Here,  
14 Oregon law determines when plaintiff commenced her action for SOL  
15 purposes.

16          Plaintiff had two years from the date she learned defendant  
17 had failed to accomplish service upon her former husband to  
18 commence her legal malpractice and fraud action against  
19 defendant. Cairns v. Dole, 195 Or. App. 742, 745, 99 P.3d 781  
20 (2004) ("a claim for legal malpractice is subject to the two-year  
21 statute of limitations set forth in ORS 12.110(1).). A claim of  
22 either fraud or legal malpractice accrues when the plaintiff is,  
23 in fact, harmed and knows, or in the exercise of reasonable care,  
24 should know that the damage suffered was caused by the  
25 defendant's tortuous conduct. Id.

26          The issue before this court is when did plaintiff know or  
27 should have known that defendant failed to timely accomplish  
28 service of the summons and complaint on Mr. Schiedler. Defendant

1 argues that plaintiff knew or should have known no later than  
2 April 2002. Defendant's evidence is his own recollection that he  
3 had a conversation with plaintiff wherein he informed her that he  
4 had missed the SOL deadline and failed to serve Mr. Schiedler a  
5 copy of the summons and complaint. Affidavit of defendant, ¶ 9.  
6 Defendant then recalls that in this same conversation or a  
7 subsequent conversation with plaintiff, plaintiff suggested to  
8 defendant that he file an amended complaint. Id. at ¶ 10.  
9 Defendant states that plaintiff thought an amended complaint  
10 would cure the SOL problem, so he told plaintiff he would  
11 research the issue. Id. After researching the issue and  
12 concluding that an amended complaint would not cure the SOL  
13 issue, defendant communicated this information to the plaintiff  
14 sometime in March or April 2002. Id.

15 Plaintiff filed her action on July 26, 2004. Defendant was  
16 served with a copy of the summons and complaint on November 3,  
17 2004, 100 days after the complaint was filed. Because the  
18 summons and complaint were served on defendant more than 60 days  
19 after the complaint was filed, plaintiff's action is deemed  
20 commenced on November 3, 2004. ORS 12.020 (if service of the  
21 summons and complaint is accomplished more than sixty days after  
22 filing of the complaint, commencement of the action is the date  
23 of service of the summons and complaint). Defendant argues that  
24 plaintiff's claim should have been filed by April 2004 and was  
25 not filed until nearly seven months later, November 3, 2004.  
26 Therefore, defendant argues, plaintiff's claims of negligence and  
27 fraud are untimely and barred by the statute of limitations.

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1 Plaintiff responds that she did not learn until April 3,  
2 2003, that her lawsuit against Mr. Schiedler was barred due to  
3 lack of timely service. Plaintiff's Affidavit, ¶ 20.  
4 Plaintiff's recollection differs from defendant's as she  
5 maintains that as late as June and July 2002, defendant  
6 represented that he would amend the complaint and effect service.  
7 Further, on October 24, 2002, plaintiff states that defendant's  
8 legal assistant, Kari Morando, admitted that the complaint had  
9 never been served, however, Morando allegedly told plaintiff that  
10 she would send it out for service.

11 Defendant asserts that he -

12 made it clear to plaintiff that I was not going to  
13 work any further on the case because the  
14 statute of limitations problem made it a fruitless  
15 endeavor. I also told plaintiff that at some point  
16 the court would dismiss her case against Greg  
17 Schiedler for lack of prosecution. Normally, I would  
18 have written a letter to the client conforming  
19 our discuss [sic] about an important issue such as  
20 missing the statute of limitations and the effective [sic]  
21 it has on the client's case. Because plaintiff was  
22 an attorney with extensive trial experience, and  
23 plaintiff had made a statement to me to the effect -  
24 that I was responsible for the negligence of my  
25 employees - I did not follow up our last several  
26 telephone conversations with a letter.

27 Plaintiff's Ex. I, Affidavit of Michael Shinn, p. 3, ¶ 12.

28 Defendant's motion for summary judgment based on the statute  
of limitations is denied. I find at least genuine disputed  
issues of fact surrounding when plaintiff should have known that  
her case was dismissed. There is, of course, no dispute that  
plaintiff knew definitely the status of her case on April 3,  
2003, when her cousin looked up her case on the Federal Court  
PACER computer system and obtained the docket sheet. However, I  
am not convinced that, as a matter of law, plaintiff should have

1 known that her case was dismissed any earlier. Defendant  
2 mistakenly relies on the fact that plaintiff worked as a lawyer  
3 prior to her disability to excuse the fact that he did not  
4 communicate in writing the status of plaintiff's case. As  
5 plaintiff notes, "the case defendant undertook to represent  
6 plaintiff in hinged on the fact that plaintiff is no longer able  
7 to practice law due to the extreme physical and mental trauma  
8 caused by her ex-husband when he assaulted her. If anyone had a  
9 reason to believe he should follow up in writing, it was  
10 defendant." Plaintiff's Response to Defendant's Summary Judgment  
11 Motion, p. 3. I agree. Further, I find evidence in the record  
12 supporting plaintiff's contention that both the defendant and  
13 defendant's legal assistant were continuing to prosecute her  
14 case, even after plaintiff discovered that defendant had missed  
15 the filing deadline. Therefore, defendant's motion for summary  
16 judgment asserting that plaintiff's claims are barred by the  
17 statute of limitations is denied.

18 Further, plaintiff's motion for summary judgment on her  
19 negligence claim is granted. Defendant admits liability  
20 therefore the only remaining issue is the amount of damages  
21 plaintiff suffered due to defendant's negligence. The parties  
22 may brief this issue.

23 Plaintiff's motion for summary judgment on her fraud claim  
24 is denied. Plaintiff has failed to set forth the legal standard  
25 for a fraud claim and to refer this court to undisputed facts in  
26 support of such a claim.

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Finally, defendant's motion for sanctions (doc. 50) is denied. The court fully expects the parties to continue to cooperate with discovery and to immediately provide any outstanding material as soon as it is received by them.

Dated this 7 day of February 2006.

/s/ Ann Aiken  
Ann Aiken  
United States District Judge